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9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 In re

13 BETTE CARR-WALTON, JAMES WALTON,
14 WALTON & WALTON REAL ESTATE
15 COMPANY,
16 Debtors.

17 WILTON MARSHALL, JR. and WILLIE MAE
18 MARSHALL,

19 Plaintiffs,

20 vs.

21 BETTE CARR-WALTON, JAMES WALTON,
22 WALTON & WALTON REAL ESTATE
23 COMPANY, and DOES 1 to 10, inclusive,

24 Defendants.

Case No. 08-32217
(Chapter 7)
Adversary Case No. 09-03068

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS

Hearing Date: July 17, 2009
Time: 9:30 a.m.
Dept.: Courtroom 23

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1 The Adversary complaint, in paragraph 3, alleges that “the allegations of Plaintiff’s state
2 court complaint, including those alleging fraud, have been established and proven such that
3 Plaintiff’s claims against these defendants are exempt from dischargeability.”
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6 The Adversary complaint alleges, at paragraph 3, that “[t]he Plaintiffs are elderly and
7 retired and did not understand they were being involved in a purchase and sale transaction.”

8 The State court complaint is attached and incorporated into the Adversary complaint.

9
10 The State court complaint alleged, in paragraph 3, that plaintiffs were induced to buy
11 their daughter’s property based on the assertion that she would lose her property if they didn’t
12 purchase it. The complaint further alleges that the daughter “tried to tell her parents they did not
13 need to do anything.”

14 In paragraph 3 of the State court complaint, the allegations are that the plaintiffs bought
15 their daughter’s property “at an inflated price” and “Plaintiffs now own a property which is not
16 worth what they paid.”

17 **Legal Argument**

18 **A. *Collateral Estoppel Requires A Final Judgment***

19
20 Here, plaintiffs plead that they obtained a clerk’s default and therefore have a
21 nondischargeable claim. This assertion is false. This Circuit in In re Harmon (2001) 250 F. 3d
22 1240 considered whether the bankruptcy court should have given precursive effect to an issue
23 raised in a prior state court action. The Harmon court held that the State court’s treatment of the
24 issue did not meet the California threshold requirement for the application of collateral estoppel
25

1 and reversed. The court reasoned that the preclusive effect of a state court judgment in a
2 subsequent bankruptcy court proceeding is determined by the preclusion law of the state in
3 which the judgment was issued. The court observed that California courts will apply collateral
4 estoppel only if certain threshold requirements are met and then only if preclusive supports
5 public policy. The court found that there were five requirements under California law. Pertinent
6 to the instant case, the fourth requirement is that decision in the former proceeding must be final
7 and on the merits. Harmon, at 1247 (citing Lucido v. Superior Court 51 Cal.3d 335) That is to
8 say, there must be a final judgment. *See also*, Ferraro v. Camarlinghi (6th DCA 2008) 161
9 Cal.App.4th 509, 537 (the prior adjudication must have resulted in a valid judgment on the merits
10 and that judgment must be final) (*omitting citations*).

12 *B. There Is No Fraud Claim Under §523 Stated*

13 The caption page states that plaintiff is proceeding pursuant to §523(a)(2) and §523(a)(4);
14 however, in the body of the complaint, the allegation is that “the conduct constitutes fraud under
15 §523.”

17 Section 523(a)(2) excepts from discharge “any debt for money, property, services or an
18 extension, renewal or refinancing of credit, to the extent obtained by false pretenses, a false
19 representation or actual fraud, other than a statement respecting the debtor’s or an insider’s
20 financial condition.”

21 Assuming the allegations in the complaint to be true, the complaint fails to state a claim
22 upon which relief may be granted. While there is allegation that defendants received a brokerage
23 commission for the sale of property from the daughter to parents, there is no allegation that they
24 obtained their brokerage commission through fraud. While the complaint alleges that the
25

1 parents did not know they were buying the property, the exhibit to the complaint negates such
2 proposition. It alleges that “unless they [plaintiffs] took action, their daughter would lose the
3 Property...KAREN MARSHALL tried to tell her parents that they did not need to do anything,
4 but Defendants... convinced plaintiffs that they had to act or their daughter would lose the
5 Property.” What would action would the parents be doing if not buying the property? Ignoring
6 the fact that two lenders were involved and these plaintiffs signed extensive loan documents
7 indicating a purchase and a purchase agreement, the daughter told her parents that they did not
8 have to buy the property. Where’s the fraud?
9

10 The conclusory allegation that the sale price was “inflated” is meaningless. Plainly, the
11 prices of 2 years ago were “inflated.” There is no allegation that the price exceeded fair market
12 value and that defendants caused buyers to pay a higher price through fraud. That the interest
13 rate on the purchase was higher than existed on a mortgage that the daughter had obtained when
14 she purchased the property does not establish fraud. There is no allegation that defendants
15 deceived the plaintiffs about the interest rate. Interest rates normally change over time. Nor is
16 the fact that there is a prepayment clause in the mortgage a fraud.
17

18 A Section 523(a)(4) claim is not stated either. While a broker/principal relationship is a
19 fiduciary relationship, the only allegation made here is that a disclosure form was not done
20 indicating that defendants represented both sides. Ignoring the fact that the purchase agreement
21 clearly spells out that the agent is for both sides and that the agent involved was the plaintiffs’
22 son, there is no allegation that plaintiffs did not know that defendants were brokering for both
23 sides or that this ignorance caused them harm. Merely saying that someone is a “swindler” or
24 that the defendants committed fraud does not state a claim for fraud as a fiduciary.
25

1 **Conclusion**

2 For all of the above reasons, we request that the Court dismiss the complaint and that the
3 Court further grant such other and further relief as is just and proper.
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5 Dated: May 22, 2009

LAW OFFICES OF BARON J. DREXEL

6 By:____/s/ Baron J. Drexel_____

7 Baron J. Drexel

8 Attorney for the Debtors
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